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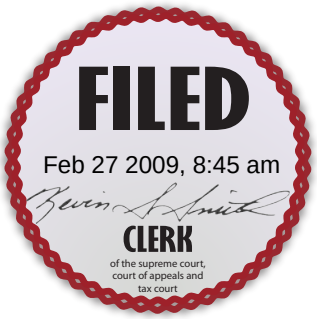

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IN THE COURT OF APPEALS OF INDIANA

ROBERT L. WILSON,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 20A05-0807-CR-399
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE ELKHART SUPERIOR COURT
The Honorable Evan S. Roberts, Judge
Cause No. 20D01-0611-FB-37

February 27, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Robert Wilson appeals his convictions and sentences for rape as a class B felony,[1] criminal confinement as a class D felony,[2] and three counts of theft as class D felonies.[3] Wilson raises two issues, which we revise and restate as:

I. Whether the prosecutor committed misconduct while questioning a prospective juror during voir dire; and

II. Whether Wilson's sentence is inappropriate in light of the nature of the offense and the character of the offender.

We affirm.[4]

The relevant facts follow. On September 13, 2006, Wilson and I.M. had consensual sex at I.M.'s apartment. The next morning, a man knocked on I.M.'s door

[1] Ind. Code § 35-42-4-1 (2004).

[2] Ind. Code § 35-42-3-3 (Supp. 2006).

[3] Ind. Code § 35-43-4-2 (2004).

[4] A copy of Wilson's presentence investigation report on white paper is located in the appellant's appendix. We remind the parties that Ind. Appellate Rule 9(J) requires that "[d]ocuments and information excluded from public access pursuant to Ind. Administrative Rule 9(G)(1) shall be filed in accordance with Trial Rule 5(G)." Ind. Administrative Rule 9(G)(1)(b)(viii) states that "[a]ll pre-sentence reports pursuant to Ind. Code § 35-38-1-13" are "excluded from public access" and "confidential." The inclusion of the presentence investigation report printed on white paper in the appellant's appendix is inconsistent with Trial Rule 5(G), which states, in pertinent part:

> Every document filed in a case shall separately identify information excluded from public access pursuant to Admin. R. 9(G)(1) as follows:
>
> (1) Whole documents that are excluded from public access pursuant to Administrative Rule 9(G)(1) shall be tendered on light green paper or have a light green coversheet attached to the document, marked "Not for Public Access" or "Confidential."
>
> (2) When only a portion of a document contains information excluded from public access pursuant to Administrative Rule 9(G)(1), said information shall be omitted [or redacted] from the filed document and set forth on a separate accompanying document on light green paper conspicuously marked "Not For Public Access" or "Confidential" and clearly designating [or identifying] the caption and number of the case and the document and location within the document to which the redacted material pertains.

looking for one of I.M.'s neighbors. After the man left, Wilson "got really mad," yelled at I.M., and accused her of cheating on him. Transcript at 308. Wilson followed I.M. to her room, hit her on the head, and "smacked [her] around." Id. at 309. He then pushed her onto her mattress, pulled off her sweatpants and underwear, and raped her. Wilson ejaculated on I.M.'s stomach and poured a cup of water on her stomach, saying: "So they won't find evidence." Id. at 317.

Wilson wiped I.M.'s stomach with her underwear and placed the underwear in his schoolbag. He removed the shoelaces from I.M.'s shoes and told I.M. to retrieve his pair of handcuffs. He again accused I.M. of cheating on him, hit her on the head, shoved a sock in her mouth, and tied another sock around her mouth with a shoelace. He tied her hands and feet together behind her with shoelaces, using the handcuffs to connect her hands and feet. Before he left, he stole five hundred dollars and a cell phone from I.M. as well as her son's video game system.

I.M. had difficulty breathing and panicked. She eventually removed the sock and shoelace from her mouth by rubbing her face against a pillow, spit out the other sock in her mouth, and moved herself toward a nearby window, which she opened by turning the crank with her mouth. She screamed for help from the window, and, some time later, some people passing by outside rescued her. I.M.'s face, hands, and feet were swollen.

On November 6, 2006, the State charged Wilson with rape as a class B felony, criminal confinement as a class D felony, and three counts of theft as class D felonies. Wilson was tried from April 22, 2008, to April 25, 2008. During voir dire, the prosecutor

asked a prospective juror about her responses to a jury questionnaire in which she stated that fifteen years earlier, she had been "a member of a jury which set free a rapist" and that, after the trial, she "learned [that the defendant in that case] had confessed to the crime but, since the prosecutor did not prove the case, the rapist was set free." Id. at 275. The prospective juror had also written that she did "not want to be a part of another situation like this. Ever." Id. Wilson objected and moved for a mistrial, arguing that the prosecutor was tainting the jury by reading the prospective juror's response. The trial court denied the motion, and the prosecutor asked the prospective juror whether anything about her previous experience as a juror would "make it difficult for [her] to be fair and impartial." Id. at 276. The prospective juror replied that she could be impartial.

After the trial, the jury found Wilson guilty as charged. The trial court sentenced Wilson to twenty years for the rape conviction and three years for the criminal confinement conviction and ordered that these sentences be served consecutively. The trial court sentenced Wilson to three years for each theft conviction to be served concurrently with the criminal confinement sentence for a total sentence of twenty-three years in the Indiana Department of Correction.

I.

The first issue is whether the prosecutor committed misconduct while questioning a prospective juror during voir dire. Wilson argues that the prospective juror's "prior experience in 'setting the rapist free' had the probable effect of tainting the other jurors." Appellant's Brief at 6. He also argues that "no guarantee exists that contrary to her

assertions [the juror] did not let her feelings towards her previous experience impact her decision in this case." Id.

In reviewing a claim of prosecutorial misconduct, we determine: (1) whether the prosecutor engaged in misconduct, and if so, (2) whether that misconduct, under all of the circumstances, placed the defendant in a position of grave peril to which he or she should not have been subjected. Coleman v. State, 750 N.E.2d 370, 374 (Ind. 2001). The "gravity of peril" is measured by the "probable persuasive effect of the misconduct on the jury's decision, not on the degree of impropriety of the conduct." Id. When deciding whether a mistrial is appropriate, the trial court is in the best position to gauge the surrounding circumstances and the potential impact on the jury. Stephenson v. State, 742 N.E.2d 463, 482 (Ind. 2001), cert. denied, 534 U.S. 1105, 122 S. Ct. 905 (2002). A mistrial is "an extreme remedy granted only when no other method can rectify the situation." Overstreet v. State, 783 N.E.2d 1140, 1155 (Ind. 2003). The denial of a mistrial lies within the sound discretion of the trial court, and will be reversed only upon a finding of an abuse of discretion. Coleman, 750 N.E.2d at 375. An abuse of discretion occurs where the decision is clearly against the logic and effect of the facts and circumstances. Smith v. State, 754 N.E.2d 502, 504 (Ind. 2001).

"The purpose of voir dire is to determine whether a prospective juror can render a fair and impartial verdict in accordance with the law and the evidence." Gregory v. State, 885 N.E.2d 697, 706 (Ind. Ct. App. 2008) (quoting Joyner v. State, 736 N.E.2d 232, 237 (Ind. 2000)), trans. denied. More specifically, such examination of prospective jurors is

used to discover whether a prospective juror has any opinion, belief, or bias which would affect or control his determination of the issues to be tried, providing a basis to exercise the right of challenge either peremptory or for cause. Id. (citing Holmes v. State, 671 N.E.2d 841, 854 (Ind. 1996), cert. denied, 522 U.S. 849, 118 S. Ct. 137 (1997)). However, the Indiana Supreme Court has condemned the practice of counsel using voir dire as an opportunity to "'brainwash' or attempt to condition the jurors to receive the evidence with a jaundiced eye." Id. at 706-707 (quoting Robinson v. State, 266 Ind. 604, 610, 365 N.E.2d 1218, 1222 (1977), cert. denied, 434 U.S. 973, 98 S. Ct. 527 (1977)). Questions that examine jurors as to how they would act or decide in certain contingencies or when presented with certain evidence are improper. Id. at 707.

Here, the prosecutor questioned the prospective juror regarding her previous experience at the trial of an alleged rapist to determine whether she was capable of being fair and impartial in the present case. The prospective juror indicated that she could be fair and impartial because "[e]very case is different[,] every prosecutor, every defendant, every judge. Every jury is different." Transcript at 277. We cannot say that, in attempting to determine whether the prospective juror could be fair and impartial, the prosecutor used voir dire to "brainwash" or condition the jurors to receive evidence with a jaundiced eye. We find no misconduct.

II.

The next issue is whether Wilson's sentence is inappropriate in light of the nature of the offense and the character of the offender. Wilson argues that his sentence was

inappropriate because of his "limited prior criminal history and his relatively young age." Appellant's Brief at 7.

Ind. Appellate Rule 7(B) provides that we "may revise a sentence authorized by statute if, after due consideration of the trial court's decision, [we find] that the sentence is inappropriate in light of the nature of the offense and the character of the offender." Under this rule, the burden is on the defendant to persuade the appellate court that his or her sentence is inappropriate. Childress v. State, 848 N.E.2d 1073, 1080 (Ind. 2006).

Our review of the nature of the offense reveals that Wilson beat and raped I.M., gagged her, tied her hands and feet together behind her back, and stole $500, a cell phone, and her son's video game system. I.M. had difficulty breathing but, though bound, was eventually able to remove her gag, open a window, and call for help.

Our review of the character of the offender reveals that Wilson has prior convictions for the unlawful use of a weapon/vehicle, theft, and domestic battery. Wilson was twenty-three years old and on probation for domestic battery when he committed the present offenses.

After due consideration of the trial court's decision, we cannot say that the sentence imposed by the trial court is inappropriate in light of the nature of the offense and the character of the offender.

For the foregoing reasons, we affirm Wilson's convictions and sentences for rape as a class B felony, criminal confinement as a class D felony, and three counts of theft as class D felonies.

Affirmed.

ROBB, J. and CRONE, J. concur